

Restorative Justice

An International Perspective

In April 1994, Judge F.W.M. McElrea, a senior district court and youth court judge in New Zealand, described the state of the criminal justice system to a conference of district court judges:

While there is a variety of views about the theory of punishment, the one thing about our criminal justice system today that seems to be agreed by all is that in practice it is not working. Crime rates keep climbing and prison populations keep growing, at considerable expense in human and financial terms. The needs of neither offenders nor victims are satisfied. The existing theoretical bases of punishment seem bankrupt. The deterrent aspect of imprisonment is questioned by the failure of longer prison sentences to reduce serious crime.¹

Little has changed in the years since Judge McElrea offered this succinct summary of the problems confronting the criminal justice system. Indeed, these problems have intensified to such an extent that it seems fair to say that the system is in crisis. But today's crisis presents an opportunity for significant reform. An important response to that crisis is restorative justice—an idea whose time has come.

WHAT IS RESTORATIVE JUSTICE?

A definition of *restorative justice* is not as straightforward as it might at first appear. Restorative justice is not a unitary concept and is therefore difficult to define.² In some ways it is an "Alice in Wonderland" sort of term, in that it means whatever the speaker wants it to mean. While most commonly used to describe a response to offending behavior, it is also used to describe a range of complementary and broadly related developments that lie outside the sphere of criminal justice responses to conventional crime. The term *restorative justice* has been used to describe everything from micro approaches—e.g., standalone victim-support projects—to macro approaches—e.g., South Africa's Truth and Reconciliation Commission or the gacaca system of justice in Rwanda dealing with those accused of genocide. This article concentrates on restorative justice as a response to offending behavior, focusing on a variety of practices that seek to respond to crime in a more constructive way than is conventionally achieved through the use of punishment.

A TRULY REVOLUTIONARY MOVEMENT

A revolution is occurring in criminal justice. A quiet, grassroots, seemingly unobtrusive, but truly revolutionary movement is changing the nature, the very fabric of our work.³

This is how the U.S. Department of Justice's National Institute of Corrections introduces a recent set of articles dealing with restorative and community justice. Paradoxically, restorative justice is moving from a peripheral grassroots movement to center stage, its ideas migrating from the margins to the mainstream, at a time when society has reached unprecedented levels of punitiveness.



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This article outlines the phenomenal growth of restorative justice around the world. Concentrating on restorative justice as a response to offending behavior, the article focuses on a variety of practices that seek to respond to crime in a more constructive way than is conventionally achieved through the use of punishment. By evaluating the diverse programs that claim to implement restorative justice, the article demonstrates the need to establish common principles for its use. ■

Punishment in response to crime and other wrongdoing is the prevailing practice in most modern societies. Those who fail to punish naughty children and offending youths and adults are generally labeled as permissive. Over the past 100 years or so the pendulum has swung from punitive to permissive and back again. The problem has been that neither approach appeared to work. The punitive-permissive continuum (depicted in Figure 1) provides a narrow perspective and limited options. The choice is either to punish or not to punish; the only variable is the severity of the punishment.⁴

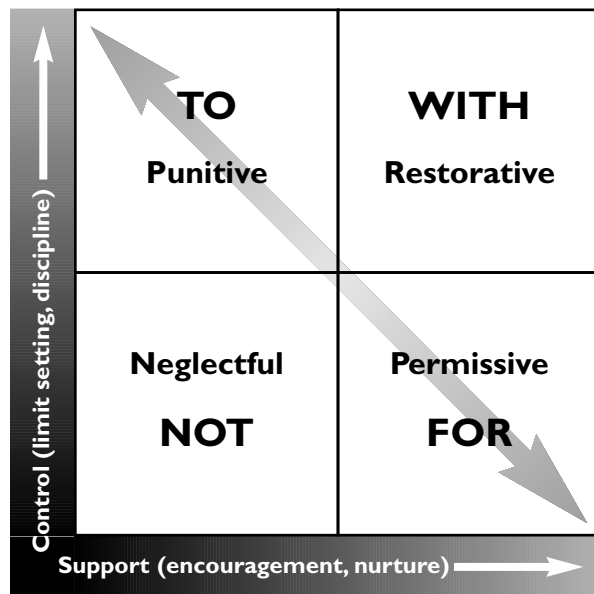
Figure 1. Punitive-permissive continuum



According to Ted Wachtel, executive director of the International Institute for Restorative Practices in Bethlehem, Pennsylvania, we can construct a more useful view of social discipline by looking at the interplay of two more-comprehensive variables—control and support.⁵

Control is defined as discipline or limit setting and *support* as encouragement or nurturing. Using these two variables, we can combine a high or low level of control with a high or low level of support to identify four general approaches to social discipline: neglectful, permissive, punitive (or retributive), and restorative (see Figure 2).

Figure 2. Social discipline window



SOURCE (Figs. 1 and 2): T. Wachtel, *Restorative Justice in Everyday Life* (1999), at www.restorativepractices.org/Pages/anu.html.

As Figure 2 shows, Wachtel subsumes the traditional punitive-permissive continuum within a more inclusive framework. The permissive approach consists of low control and high support, a scarcity of limit setting, and an abundance of nurturing. Opposite permissive is the punitive (or retributive) approach, high control and low support. The third approach, with an absence of both limit setting and nurturing, is neglectful. The fourth possibility is restorative. This approach features high control and high support. It confronts and disapproves of wrongdoing while supporting and valuing the intrinsic worth of the wrongdoer. *Control* in this context means control of wrongdoing and not control of the individual.

Wachtel explains the use of the four keywords *not*, *for*, *to*, and *with* in his “social discipline window.”⁶ If we are neglectful toward troubled youth, we do *not* do anything in response to their inappropriate behavior. If we are permissive, we do everything *for* them and ask little in return. If we are punitive, we respond by doing things *to* them. If we respond in a restorative manner, we do things *with* them and involve them directly in the process. A critical element of the restorative approach is that, whenever possible, *with* also includes victims, family, friends, and community—that is, those who have been affected by the offender’s behavior.

Restorative justice fits into the picture here. But will this new revolutionary movement really change the nature and very fabric of our work, or is it just another passing fad?

The first thing to say is that restorative justice is not new. In fact, it is as old as most people’s histories. In my own country, Ireland, the Brehon law system, which operated from prehistory up to the 17th century, contained many of the elements of restorative justice. The victim and offender were seen in the context of their community. The emphasis of judgment was on restoring the status quo rather than simply on retaliation and retribution. The same is true of the other countries we will look at.

FEATURES OF RESTORATIVE JUSTICE

Restorative justice is not a grand system imposed by “experts” but has deep roots in ordinary people’s values, needs, and experiences. These drive the primary goals of intervention and the process itself. Specifically, because crime is viewed first as harm to victims and victimized communities, the justice intervention must focus on repairing the harm—“healing the wound”—that crime causes. The process necessarily elevates the role of the victim and focuses on the victim’s needs. At the same time, it allows for victim, offender, and community input and involvement in a process that seeks to find common ground

and attend to the mutual needs of each co-participant. Restorative justice thus uniquely comprises three dimensions: the central and elevated role of the victim, the general focus on repair, and the procedural emphasis on seeking mutual involvement and support for the three co-participants and explicitly promoting the role of each in producing justice outcomes.

REPAIRING HARM

Currently, when a crime is committed, two primary questions are asked: Who did it, and what should be done to the offender? The latter question is generally followed by another question about the most appropriate punishment and, when a child or young person commits the crime, about the most appropriate treatment or service. Viewed through the restorative “lens,” however, crime is understood in a broader context than that suggested by the questions of guilt and punishment. In restorative justice, three very different questions receive primary emphasis: What is the nature of the harm resulting from the crime? What needs to be done to make it right or repair the harm? Who is responsible for making it right or repairing the harm?

THE “CENTRALITY OF THE VICTIM”

The centrality of the victim is a distinguishing feature of restorative justice. The moment the justice system does not view the victim as the central person, it becomes offender-based, and then we get the usual excusing, condoning, and explaining responses to the offender’s behavior that are ultimately self-defeating and hopeless. Our current system, particularly when dealing with adults, gives first priority to the offender: Did the offender do this, or did he not do it? If he did do it, what is a just, deserved, appropriate, measured, and consistent response? The problem with this approach is that it does not take into account the victim’s interests. Emphasizing similarity of outcomes among offenders, particularly adults, can promote an unjust disparity in outcomes among victims.⁷

EMPHASIS ON THE THREE CO-PARTICIPANTS

For the victim, restorative justice offers the hope of restitution or other forms of reparation, access to information about the case, and the opportunity to be heard and to have input into the case, as well as expanded opportunities for involvement and influence. For the community, there is the promise of reduced fear and safer neighborhoods, a more accessible justice process, and increased accountability, as well as the obligation to participate in

sanctioning crime, restoring victims’ sense of well-being, reintegrating offenders into the community, and preventing and controlling crime. For the offender, restorative justice requires accountability in the form of obligations to repair the harm to individual victims and victimized communities as well as the opportunity to develop new competencies, social skills, and the capacity to avoid future crime.

As an overall goal, restorative justice seeks to address and balance the rights and responsibilities of victims, offenders, and communities against those of the government. In this way, it improves upon the conventional criminal justice system, which focuses on the “public interest,” embodied in the government, as the principal consideration to be taken into account in the decision whether to prosecute an offender.⁸

In integrating the interests of the three co-participants, restorative justice builds on what James Dignan⁹ has called the “three Rs”: responsibility, restoration, and reintegration. I would like to add a fourth R, for respect.

Responsibility. One of the primary aims of most restorative justice approaches is to engage with offenders to help them come to appreciate the consequences of their behavior, both on themselves and on their victims. Only then can they take responsibility for those consequences.

Restoration. A second aim is to encourage and facilitate the provision of appropriate forms of reparation by offenders, toward either their direct victims (provided these victims are agreeable) or the wider community.

Reintegration. A third aim is to seek reconciliation between victim and offender where this can be achieved. Even if it cannot, the process strives to reintegrate both victims and offenders into the community as a whole following the commission of an offense.

Respect. A fourth aim, informing the first three, is to treat all participants with respect. People need to feel that they are being treated with respect and consideration, no more so than after an offense, which often occasions a sense of shame in the victim, the offender, and the offender’s family. Law professor Erik Luna of the University of Utah stresses the importance of respect in restorative justice:

Successful restorative sanctioning begins with a single principle that structures the entire process: respect. As used here, respect is a sense of dignity, worth and recognition accorded one’s self, another individual, a physical object or an abstract concept. Crime and a criminal lifestyle are driven, to a large extent, by the pursuit of respect by the offender and a lack of respect for those affected by the offence. From the viewpoint of the victim, crime is the ultimate statement of disrespect for her privacy, autonomy, property, security and general well-being. For the community and its members, offending is

a sign of disrespect—of law and authority, the concept of civility, the benefits of organized society, and so on. The human tendency is towards reciprocity, to meet disrespect with disrespect, leaving victims and communities to reject the offender as being worthy of dignity.¹⁰

It is easier to respect the victim than the offender. But respect is essential if there is to be any hope of breaking the spiral of offending behavior. Respect offers the best hope of dissolving alienation.

Respect implies a belief that the individual has within him- or herself the capacity to grow and change. It implies an understanding that, out of defensiveness and inner fear, individuals can and do behave in ways that are incredibly cruel, horribly destructive, immature, regressive, antisocial, hurtful. Respect implies that, for all his or her failings, the individual is still part of the community. It implies an acceptance by the community that the offender exists as a valued person with a separate identity.

When people find that their community understands them, they develop a set of growth-promoting or therapeutic attitudes toward themselves that are the first step in the change process. But this is not letting the offender off the hook. Most offenders find the thought of taking responsibility for themselves a frightening prospect and would rather leave it to the court. Shirking responsibility is easier than shouldering it. The restorative process supports the offender in facing up to his or her responsibilities. Respect is the key that will unlock the door and allow the rehabilitation process to begin.

RESTORATIVE JUSTICE PROCESSES

The restorative justice processes considered in this article are all built on the philosophy of the three Rs outlined above. The importance of the fourth R is sometimes overlooked. But without respect, the prospects for successful outcomes are greatly diminished.

The two main restorative justice approaches are family group conferencing and victim-offender mediation. Family group conferencing comprises a number of distinctive models. We will look at the New Zealand model, the Wagga Wagga model, neighborhood sanctioning boards, and circle sentencing. The subsequent section discusses victim-offender mediation.

FAMILY GROUP (OR COMMUNITY) CONFERCING

The family-group-conferencing approach to criminal justice originated in New Zealand in 1989 as a result of several factors.¹¹ One was a movement that resulted from the anger felt by New Zealand's Maori and Pacific Island

communities toward the previous youth justice system. That system regarded young people as individuals in their own right, not as members who had obligations to their wider family and whose wider family had obligations to them. This anger helped spur an attempt to include ancient Maori traditions of resolving disputes within the criminal justice process. The second major factor was the international recognition of victims' interests and the way in which they had been overlooked in the past. Third, international recognition that institutions as then constituted were part of the problem and not the solution led to calls for reform.

The result was enactment of a radical new set of practices for dealing with young offenders under the Children, Young Persons and Their Families Act of 1989. The vision of New Zealand's legislation was to harness community strengths and community wisdom and to connect victims and offenders as individual people in a way that the criminal justice system had previously failed to do.

Quite apart from the issues pressing for change in the way young offenders were dealt with, there was a concern on the "care" side that professionals were failing to keep children safe through professional case management and that the community needed to be involved to bring its collective wisdom and strengths to the problems of child abuse and neglect. At the time, a number of pilot programs involved families in the development of care plans to help resolve neglect and abuse cases and to promote child protection. Today New Zealand's welfare system uses conferencing as the central diversionary device on the dependency side.

Conferencing encourages the participation of a wide collection of people who are "concerned" in some way about the offense.¹² They include those who are concerned for the well-being of either the victim or the offender, those who have concerns about the offense and its consequences, and those who may be able to contribute toward a solution to the problem presented by the offense. This collection of people—who might also include those who are indirectly affected by the offense—have been described as making up a "community of interest,"¹³ and the whole approach is sometimes referred to as a "communitarian" model.¹⁴ However, the community in question is not a geographical entity as such, nor does it comprise "representatives" (whether elected, appointed, or self-appointed).

The New Zealand Model

The New Zealand conferencing approach has a number of distinctive features, as set out by McElrea:¹⁵

1. It is integrated and fully incorporated into the youth justice system as a whole (which deals with those over the age of 14 but not older than 17).
2. There is an effective “gate-keeping” procedure whereby both traditional means of obtaining a suspect’s appearance at court—arrest and summons—are carefully restricted. The aim of this procedure is to ensure that young persons are diverted from court wherever possible. Thus, no arrest can be effected unless it is needed to prevent further offending, absconding of the young person, or interference with witnesses or evidence.
3. Furthermore, no summons can be issued without first referring the matter to a youth justice coordinator, who will then convene a family group conference (FGC), which recommends for or against prosecution, with a presumption in favor of diversion. All members of the FGC (including the young person) must agree to the proposed diversionary program, and its implementation is essentially consensual.
4. Where the young person has been arrested, the court must refer all matters (charges) that are not denied to an FGC, which recommends a disposition to the court. This usually consists of a plan of action incorporating a “restorative outcome” (e.g., apology, financial reparation, work for the victim or for the community, a curfew, or some undertaking relating to future behavior). The plan normally nominates persons to supervise its implementation, and the court is asked to adjourn proceedings for a suitable duration to allow for this to happen. Occasionally, an FGC recommends a sanction for imposition by the court.
5. Apart from murder and manslaughter, which for public-policy reasons are excluded from the youth court, every offense (including indictable-only offenses and all the other very serious charges) must be dealt with by means of a family group conference. In the case of indictable-only charges, the young person’s case may be adjudicated in adult court. The young person who wishes to admit the charge may be given the right to remain in the youth court and be dealt with there rather than be transferred to the adult court. In practice, the emphasis is on keeping such cases in the youth court unless all the options and strengths of the family- and community-based youth court have been exhausted and no other options remain.
6. All FGCs are facilitated and convened by a youth justice coordinator, who is an employee of the department of social welfare. Those in attendance will be the

young person, members of the (extended) family, the victim (if willing to participate), a youth advocate (if requested by the young person), a police officer (usually from the specialist youth aid division), a social worker (in certain cases only), and anyone else the family wishes. The last category could include a representative from a relevant community organization (for example, an addiction treatment agency or a community-work sponsor).

7. The youth court nearly always accepts FGC plans. Outstanding successes have been achieved in instances of very serious offending without the need for any formal court sanctions. If the plan is carried out as agreed, the proceedings are usually withdrawn. If the plan is not implemented satisfactorily, the court can impose its own sanctions. In both serious and nonserious cases where family or community intervention has been ineffective and it has fallen to the court to sentence the youth, the court has a wide range of sanctions available. Such instances, however, are quite rare. If there is a referral to the district court, the available sanctions include imprisonment for up to five years. The court thus acts both as a “quality-control” mechanism that is capable of coming into play in the event of patently unsatisfactory recommendations, and as a “default” procedure in cases where plans break down.

The New Zealand-style FGC model is now well established in New Zealand and has been exported to other jurisdictions. Australia has developed its own unique model; however, family group conferencing was introduced to South Australia in early 1994¹⁶ and later to Victoria¹⁷ and Queensland.¹⁸ New South Wales uses family group conferencing as its main way of dealing with offenders. It is widespread across most states of the United States of America. Pilot programs operate in Belgium. In the United Kingdom, all of the youth offending panels are operating family group conferencing as part of their options for dealing with young people. It has been introduced in South Africa. A range of programs is in use in Northern Ireland, some operated by the police, some by the probation service, and some by voluntary groups.

The Australian Model

An Australian model of conferencing evolved from John Braithwaite’s theory of reintegrative shaming.¹⁹ It originated in 1989 within a police district in Wagga Wagga, New South Wales, and is generally known as the Wagga Wagga model. It differs in a number of key respects from both the New Zealand model and also from the victim-offender mediation model, which is discussed below.

1. The Australian variant is police-led, in the sense that the police not only decide which cases might be appropriate for conferencing but also are expected and encouraged to convene and facilitate the conferences. This represents a clear break from the values and practice base associated with victim-offender mediation, which emphasizes the need for a scrupulously independent mediator who should be capable of eliciting the trust of both main parties. As a result of the criticism surrounding this lack of independence, coordination of conferences in New South Wales has recently shifted from the police to the office of juvenile justice.
2. The conference itself is carefully scripted—not only to ensure consistency, but also to ensure that the “restorative” nature of the process is maintained,²⁰ even though those delivering it may be unfamiliar with it and relatively untrained (in comparison with conventional mediators).
3. The approach has been consciously developed as a distinctive model of policing that emphasizes crime prevention. It is sometimes referred to as “restorative policing”²¹ or “restorative community policing”²² and is seen by many of its supporters as an effective method of transforming police attitudes, role perceptions, and organizational culture.

Following the developmental work in Wagga Wagga, police-based restorative conferencing techniques have been introduced in other Australian jurisdictions, notably Canberra and Sydney. They have also been “exported” to several other countries: the United States,²³ Canada,²⁴ the United Kingdom,²⁵ and Northern Ireland.

In Thames Valley, England, the Wagga Wagga model is evolving along lines that bring it closer to the New Zealand model of FGC. All those personally affected by an offense are invited to attend and take part in the official police cautioning session.²⁶ Participants may include any victims and their supporters; those in caring relationships with the offender, such as parents, partners, or siblings; and, sometimes, members of the wider community. The name of the proceeding changes depending on who is in attendance: it is called a “restorative caution” if the victim is not present, a “restorative conference” if the victim is present, and a “community conference” if members of the wider community attend.

Sentencing Circles

“Circle sentencing” is a recently updated version of practices adapted from the traditions of Canadian aboriginals as well as those of indigenous people in the southwestern United States. It is based not only on the concept of

mutual forgiveness but also on the *responsibility* placed on every member of the community to forgive.

There is a strong belief that, when the State takes ownership of the process of crime and punishment, it draws away from the community and loses touch with the wishes and needs of the people. As with other restorative justice approaches, supporters argue that designing a circle-sentencing program that is applicable to every community in the country, or, indeed, in the state, is not possible. Every community has the right to decide how it should deal with offenders. The offense arises within the community, and that is where the solution must be found.

The modern version of circle sentencing involves a partnership between traditional circle rituals and criminal justice procedures in which victims and their supporters, offenders and their supporters, judge and court personnel, prosecutor, defense lawyers, police, and all community members who have an interest in the proceedings come together. The judge presides over the process but sits among the participants and is just another member of the circle, contributing like everyone else. The aim is to work consensually to devise an appropriate sentencing plan to meet the needs of all interested parties. At the end of the day it is the judge’s responsibility to incorporate the plan into a formal court sentence. But the plan does not deal just with the needs of the offender or with the needs of the victim and the offender; it will have all kinds of cross-commitments and covenants about what various people have agreed to do. Judge Barry Stuart of the Territorial Court of the Yukon, who has presided over more than 300 sentencing circles, recalls only three occasions on which the circle failed to reach a consensus and he was forced to make the decision. The judge does have the authority to impose a prison sentence if appropriate, and this could be the decision of the circle; in actual practice, however, prison sentences are rare.

In Saskatchewan, Judge Bria Huculak and her colleagues began using sentencing circles in 1992, building on Judge Stuart’s experience in the Yukon. “In the first year,” Huculak says, “we made it up as we went along, learning from our mistakes.”²⁷ What they now have is a process that combines aspects of victim-offender mediation, aboriginal peace-making circles, and democratic discussion. The aim is to identify the harm done by an offense and to identify appropriate ways of responding to it and, if possible, repairing it.

The key ingredient is a safe atmosphere in which people can discover the real issues and needs. Anyone from the public can observe. The judge outlines the basic facts of the case and asks the offender to respond. Then, one after another, everyone in the circle has an equal opportunity to

say what he or she wishes. "My role is broadly like that of a facilitator," explains Huculak. "I'm in control, but I say very little. I strive for consensus, not total agreement."²⁸ People can choose not to comment at any stage, but at a later point they are always given an opportunity to speak. Sometimes, a "talking piece"—an object held by the person talking until he is ready to hand it to his neighbor—is handed round. "It's not a linear process," Huculak observes. "It's more like a spiral, or like peeling the layers of an onion. What happens is very demanding on the accused. The idea that they're getting off easy is not realistic. They have to account for their behavior in a very direct way."²⁹

But what about the vulnerability of the victim, particularly in more serious cases such as rape or other violence? Sensitivity is crucial, says Huculak. "The victim often feels a sense of shame for being victimized. The offender and his family may also feel ashamed. People need to feel that they are being treated with respect and consideration. But they also often want to ask questions of the offender—to ask, for instance, 'Why me?'"³⁰ Deep feelings often emerge, and Huculak does not see her role as reining people in. "I tell participants that no one is required to cry, but if they feel they want to, that's OK."

The process may take six or seven hours. Sometimes, sentencing circles recommend novel sentences to the judge. Prison sentencing is much reduced. One offender, whose drunk and dangerous driving had caused the death of his father, had to spend the next year or so explaining his crime and waywardness at public meetings of young people as part of his punishment. A variety of penalties may be imposed, including "close community support" and "accountability."³¹ The judge can overrule the proposed action plan but rarely does.

Even in cases where offenders may not have seen their families for years, family members do turn up. The process helps make better connections. The family members realize they could have a role.

Today in Saskatchewan sentencing circles are used in only a small percentage of cases, but a new courtroom in Saskatoon has been specially designed for them. Several other Canadian provinces are now using similar approaches.

Huculak says: "At the end of a day in a traditional courtroom, judges may leave disappointed. In circles, I usually leave feeling hope for the offender, hope for their rehabilitation, hope for the victims, and hope for a safer community."³²

One difficulty with circle sentencing is that such practices are likely to be relevant only to communities with a strong sense of identity and a relevant set of traditions. Even this is unlikely to be sufficient if the offenders them-

selves have become alienated from their traditions.³³ This problem, however, is not unique to circle sentencing.

Neighborhood Sanctioning Boards

Neighborhood sanctioning boards have a long history in the United States and the rest of North America. These are closer to the victim-offender mediation model³⁴ than to family group conferencing. Variants of this model—called "neighborhood sanctioning boards," "community panels," or "neighborhood justice centers"—have become established in North America, Australia, and Norway (where they are known as "municipal mediation boards"). They deal with cases involving disputes that are referred by either the police or the courts and attempt to mediate by using trained independent mediators or mediators selected from a community panel. If the mediation is successful, the prosecution is dropped.

A somewhat different variation on the same theme is illustrated by the adoption of "community reparative boards" in the state of Vermont in the United States.³⁵ These boards have been used mainly for offenders convicted of nonviolent and minor offenses after the court has sentenced them to participate in the process. The community reparation board is a small group of citizens who have been intensively trained for the purpose. Their role is to conduct public, face-to-face meetings with offenders, during which they discuss the nature of the offense and its negative consequences. The members of the board then develop a set of proposed sanctions, which they discuss with the offender until all the parties agree on a set of reparative measures that the offender is to undertake within a given time period. The primary emphasis is placed on encouraging offenders to learn ways to avoid reoffending. The offender's progress in discharging these undertakings is monitored, and after the period (90 days) has elapsed, the board submits a report to the court indicating the extent to which the offender has complied with the sanctions.

"Children's hearing panels" in Scotland share with mediation and conferencing processes a procedure founded on informal and inclusive discussion involving the child and the family. Attendance is compulsory, however, and the victim is not included. The panel is not obligated to facilitate or encourage the production of restorative outcomes. Although the procedure does have some restorative "potential," it would require major modification of the process for this potential to be realized, which modification would, in turn, require legislative reform.

In England, on the other hand, a Home Office White Paper in 1997 spoke of the need "to reshape the criminal justice system ... to produce more constructive outcomes

with young offenders.”³⁶ It proposed the creation of a youth panel scheme based on the three key restorative justice principles. First-time and less-serious offenders who pled guilty would be referred to a new, noncriminal “youth panel” for a specified period (not less than 3 months nor more than 12 months) by way of disposal.³⁷ This panel would seek to involve the offender and others (including the offender’s family and the victim—provided they consent—and youth justice workers) in drawing up an agreed “contract.” The contract would seek to achieve reparation for either the victim or the community and also rehabilitation and support for the offender (which should assist with the aim of reintegration). Moreover, once the contract had been successfully completed and “signed off” by the youth court, the original conviction would be regarded as expunged for the purposes of the Rehabilitation of Offenders Act.³⁸

The Youth Justice and Criminal Evidence Act of 1999³⁹ seeks to implement these proposals. Under section 6 of the act, the responsibility for establishing a youth offender panel (and also for supervising the offender’s compliance with any agreement reached) would rest with the youth offending teams introduced under the 1998 Crime and Disorder Act.⁴⁰

Although the primary purpose of any agreement reached with the offender is said to be the “prevention of re-offending by the offender,”⁴¹ restorative outcomes feature prominently (though not exclusively) in the terms of the programs specified in the act. They include financial or other reparation to a (direct or indirect) victim, attendance at a mediation session, and unpaid work for the community.⁴² The act rules out the imposition of physical restrictions on the offender’s movements or electronic monitoring of his or her whereabouts.⁴³ The act also specifically prohibits the imposition by the youth court of any other sanctions.⁴⁴ These latest proposals represent a much more radical set of reforms to the English criminal justice system than those contained in the Crime and Disorder Act. Indeed, they could encourage the development of a New Zealand-style conferencing procedure, though they do not require it. Alternatively, they could come to function more along the lines of the Scottish children’s hearing system, but with a restorative focus.

VICTIM-OFFENDER MEDIATION

Mediation has a long tradition in many countries around the world. However, victim-offender mediation (VOM), as most widely used today, originated in 1974 in Elmira, Ontario, under the influence of the Christian Mennonite movement.⁴⁵ The primary emphasis of VOM is on the

quest for “reconciliation” between victims and offenders. Thus the disputants themselves are central to the process.

Victim-offender mediation involves a process of dialogue between victims and offenders relating to the offense. It provides a safe and structured setting and a trained mediator for any meeting between the parties. It gives victims the chance to tell offenders about the physical, emotional, and financial impact that their offenses may have caused and offers an opportunity to ask them unanswered questions. It also enables victims to participate in discussions about what may be required of the offender to make amends and may help victims psychologically to bring about a “closure” of the incident, enabling them to put the matter behind them. It requires offenders to face up to the reality of what they have done but also offers them the opportunity to begin to restore their own reputations and sense of self-worth.

Mediation may be direct (face-to-face) or indirect (where the mediator acts as a go-between). The direct approach is more common in North America, while the indirect approach is more common in Britain, where it is frequently included in “cautioning-plus” schemes (mostly aimed at juveniles). Precourt programs generally involve police cautioning. Court-based schemes operate either by way of adjournment or deferment. Some programs operate postsentence, including during the period prior to an offender’s release from custody.

Victim-offender mediation services are not operated formally in New Zealand. They are an inherent part of family-group-conferencing processes, and a good number of police diversion programs use a type of victim-offender mediation as part of police diversion from court and from family group conferencing. In New Zealand, family group conferencing is held back as a high-level intervention; to avoid overwhelming the FGC process, every effort is made to use police diversion as a lower-level option for a wide range of offenses.

In New Zealand’s adult system, private groups using restorative justice approaches are popping up all around the country as adult restorative justice movements grow stronger. These groups are offering themselves as alternative possibilities for diversion from the adult criminal court. Often, too, after an offender’s admission of guilt, the judges in adult courts are now beginning to request a community conference and consider its recommendations in sentencing.

In 1998, Mark Umbreit⁴⁶ estimated that victim-offender mediation services operated in more than 290 communities in the United States, with a similar number operating in Germany, 130 in Finland, 54 in Norway, 40 in France, and 26 in Canada. There were 20 in England,

8 in Belgium, 5 in Australia, 2 in Scotland, and 1 in South Africa. The first youth-targeted victim-offender mediation in Russia took place in October 1998, and VOM has recently been introduced into China. Clearly, its use has continued to expand since Umbreit's survey three years ago.

INTEGRATING RESTORATIVE JUSTICE INTO THE JUSTICE SYSTEM

When we come to consider the extent to which restorative justice has been integrated into the justice system we find, once again, that there is a range of models.

THE SUBSIDIARY MODEL

Restorative justice programs can operate in a subsidiary role to "plug the gaps" in the current system. This method of implementation, however, gives short shrift to many of the principles of restorative justice. One of the main shortcomings of the retributive criminal justice system is its failure to adequately acknowledge the personal harm experienced by victims. Court-ordered compensation by the offender to the victim attempts to redress that failing, while community-service orders attempt to redress the debt to the community. But there is no attempt in either case to repair any relationships that may have been damaged as a result of an offense, and indeed, neither victims nor offenders are greatly empowered by the award of compensation because they are not involved in the decision-making process. These are coercive measures, and one of the key attributes of restorative justice is that it is non-coercive.

THE STANDALONE MODEL

Restorative justice programs can operate outside the existing criminal justice system in a supplementary capacity, rather than as an alternative to it. The defining characteristic of this "standalone" model is simply the absence of any statutory authorization for the program. On the whole, these tend to be experimental, pilot-type projects; hence there is a considerable degree of diversity among them. It is possible to find examples of all four of the restorative justice models outlined above operating as standalone programs, including the majority of victim-offender mediation schemes, some family-group-conferencing initiatives, Vermont-style community reparative boards, and sentencing circles.

The criminal justice contexts within which they operate are also highly variable. Some are pretrial initiatives, which might be either police-based or accessed by a prosecutor. Standalone police-based schemes include those combining a traditional caution with the possibility of

mediation and possibly reparation, often referred to as "caution-plus." In some parts of Scotland, standalone mediation and reparation schemes receive referrals directly from the independent prosecutor, or procurator fiscal, provided both parties consent.⁴⁷ Most of the court-based victim-offender mediation schemes also operate as standalone schemes, and some also accept referrals at the post-sentence stage.

Standalone restorative justice initiatives offer a number of benefits. This is particularly true during the experimental and developmental phases of a particular process or program, when there may be an acute need to explore different forms of practice and to test and refine those that have been developed within different criminal justice and institutional contexts. They also can be used to extend boundaries beyond existing practice limits, particularly in relation to older or more serious offenders.

PARTIALLY INTEGRATED MODELS

In some instances, programs are partially integrated into the system.

The HALT Program: The Netherlands

In the Netherlands, for example, the HALT⁴⁸ program was originally developed in the 1980s for young offenders who committed acts of vandalism against Rotterdam's public transit system. The program was designed to provide speedier, more effective action at a time when petty crime was rising and the regular criminal justice system was felt to take too long and to deliver ineffectual sanctions.⁴⁹ Police can refer offenders under the age of 18 to HALT programs provided they admit guilt and consent to the referral, the offense is minor, and they have not been referred in this way on two previous occasions. After consultation with both parties, the HALT coordinator offers the offender a program consisting of work relevant to the offense and, if possible, of benefit to the victim, payment of damages, and, in some cases, an educational component. Offenders are required to wear distinctive clothing while performing reparative tasks. This requirement would appear to put the emphasis on stigmatic shaming, which sits uneasily alongside claims that HALT is a "restorative" approach.

Since its introduction, the HALT program has received official backing from both the ministry of justice, which now funds 50 percent of its cost, and local authorities, which fund the balance. This support has fueled an expansion in the number of HALT programs to 70, thereby making it available to half of the local authorities in the Netherlands. In The Hague, one-third of all young offenders—around 700 per year—are referred to HALT.

About 95 percent of HALT cases are successfully completed; unsuccessful cases are referred to the police for prosecution. Forty percent of HALT participants are said to reoffend, compared to 80 percent of those who are prosecuted.⁵⁰

Despite these apparent successes, the scope of the HALT program is still relatively restricted in terms of the types of offenses and categories of offenders it covers and in the sense that its coverage is by no means geographically universal. Moreover, reactive measures such as HALT may be an inferior substitute for primary crime prevention measures such as teaching conflict resolution to schoolchildren.

The STEP Program: Northern Ireland

The aim of the Royal Ulster Constabulary's (RUC) STEP program is crime prevention—to provide socially disadvantaged young people at the beginning of a criminal career with a pathway to responsible membership in the community.

While the police are the lead agency, a key strength of STEP is its multiagency approach. A strong partnership has been formed with local colleges of education, the probation board, the training and employment agency, and the youth service.

STEP's target group is young people who are unemployed, socially disadvantaged, and not yet habitual offenders. The program consists of 10 weeks of challenging interventions designed to tackle issues of offending behavior and equip the individual with skills, including interview skills, that will move him or her toward employment.

Initially this project was aimed at young people over 16. However, it soon became apparent that more success might be achieved with 14- to 16-year-olds. In developing this project, the RUC in Northern Ireland entered into a transnational partnership with Stockholm, Rotterdam, and the town of Fucecchio, Italy, all of which were conducting similar projects. The partnership allowed the exchange of information and facilitated research and the development of new methods of intervention. Initial indications are that the program has been an outstanding success.

Penal Mediation: France

In common with a number of other European countries, France has introduced a system of "penal mediation" in recent years.⁵¹ Under the Law of 4 January 1993, the state prosecutor now has the discretion to refer offenders under the age of 18 to mediation as an alternative to prosecution. The practice of penal mediation is encouraged by the ministry of justice and by associations for the assistance of victims. As a result, recourse to the measure is increasing

steadily, though mainly it is applied to minor offenses committed by first-time offenders.

Under this program, victims' interests appear to be adequately safeguarded because victims not only have to give their consent for mediation to proceed, but may also seek reparation from the offender before a judge if they are dissatisfied with the outcome of the mediation process. However, there have been concerns about the extent to which the offender's interests are safeguarded under the penal mediation procedure.⁵² Offenders do have a formal choice whether to take part in mediation, and most agree to it because they are likely to be informed that the alternative is prosecution. If the mediation is successfully concluded, the prosecutor terminates the prosecution. If, however, the mediation is unsuccessful and the prosecutor refers the matter to court, the offender's position is seriously disadvantaged because guilt is now assumed. Moreover, the offender may be more likely to be convicted than he or she would have been before the introduction of penal mediation in 1993, when relatively minor offenses might not have been prosecuted.

These examples show that, even where victim-offender mediation is given legislative backing, care still needs to be taken to ensure, first, that its application is not excessively restricted and, second, that an appropriate balance is achieved between the various sets of interests that are in play.

Reparation: New Zealand

The New Zealand Criminal Justice Act of 1985 made reparation a victim-focused sentencing option in its own right.⁵³ Initially it applied only to property offenses. Its application was extended in 1987 to cover cases in which victims had suffered emotional harm, and again in 1993 to enable courts to consider any offer of reparation made by an offender when imposing any sentence. The measure was intended to establish reparation as a sentence of first resort that would also provide opportunities for victims and offenders to negotiate the amount of reparation payable. Some probation officers have used reparation as a basis for victim-offender mediation. It was also intended to make offenders more accountable for what they had done. Reparation orders requiring payment for both property loss and for emotional harm are widely used as formal orders in the adult system, and it is increasingly common to see adult restorative justice conferences held. The challenge awaiting the adult court is to see those reparation orders more particularly embedded in the mainstream of the adult criminal system.

In the youth court, family group conferences operate as a matter of course. One of the formal orders that the youth

court can make is a reparation order requiring the formal return of money following a family group conference.

Reparation Order: England and Wales

In England and Wales, the Crime and Disorder Act of 1998⁵⁴ introduced the reparation order as part of its youth-justice reform package, though the measure is only due to be implemented nationally after it has been piloted in four geographical locations.

There are a number of differences between the English legislation and that in New Zealand. First, the reparation order is restricted to offenders between the ages of 10 and 18. Second, the English legislation introduces a presumption in favor of such orders and requires a magistrate to give reasons for not imposing one in cases where the court has the power to do so. However, a reparation order cannot be combined with many other types of orders. Third, the English legislation enables courts to impose “in-kind,” rather than financial, reparation. Fourth, the courts will be able to order offenders to make reparation either to the victim or the community, though the victim’s consent will need to be obtained before reparation can be awarded to an individual. Victim-offender mediation is encouraged but is not compulsory.

The English legislation assigns responsibility to the new multiagency “youth offending teams” that local authorities will be obliged to establish once the act comes fully into force. Each team will consist of police and probation officers and staff from social services (juvenile justice staff) and health and education services. In New Zealand, by contrast, responsibility is given to the probation service.

Concerns have been expressed that the U.K. act may not have given sufficient priority to a restorative justice approach over more traditional retributive responses. This is not surprising, given that efforts to introduce restorative programs continually run into opposition from a powerfully entrenched retributive criminal justice system.⁵⁵

THE FULLY INTEGRATED MODEL

The most effective way of securing restorative justice’s undoubted potential is to adopt a fully integrated approach. Establishing restorative justice as a response that operates at the heart of the criminal justice system is much more likely to result in real justice and avoid the problems of marginalization and subordination to other interests than are standalone programs or partially integrated compromise approaches. Even under a fully integrated system, some implementational difficulties are likely to be experienced, but these are less likely to be systemic in nature

than the problems associated with the other, more restrictive implementational options.

No jurisdiction has yet sought to fully integrate a restorative justice approach into its criminal justice system. New Zealand has come closest by incorporating family group conferencing at the heart of its youth justice system. Paradoxically, it was never intended to be a restorative justice system: it was intended to deal with the concerns of Maori and Pacific Islanders and with their exclusion from matters affecting their young people, to deal with victims’ interests more effectively, and to recruit the community’s assets to replace institutions that were not meeting young people’s needs. The new system was in fact planned and put into place before restorative justice was properly understood to be such a powerful driving force in these matters. It was New Zealand’s good fortune that it had a legal system in place that supported restorative justice so seamlessly. Chief Judge David Carruthers⁵⁶ points out that practice has in fact led the law in implementing restorative justice approaches in New Zealand. The most successful models have been able to use the law and enhance restorative justice practices and processes without that outcome ever being the full intention of the original legislation. However, several jurisdictions in Australia have introduced legislation that seeks to incorporate such an approach into the justice system. These include South Australia, New South Wales, and Queensland.

SCOPE OF RESTORATIVE JUSTICE INITIATIVES

The tendency in many parts of the world has been to restrict the scope of restorative justice initiatives to minor offenders as opposed to more serious (or persistent) ones, and to juveniles rather than adult offenders. This tendency is one reason for the marginalization of these programs. The New Zealand experience argues strongly in favor of the principle that restorative justice should not be confined to cases below a given level of seriousness or to particular categories of offenders, whether on grounds of age or prior criminal experience. In New Zealand, only the more serious cases are referred for conferencing,⁵⁷ and all of those but the most serious (murder and manslaughter) are referred automatically.⁵⁸ Consequently, the most serious 20 to 30 percent of offenses result in conferences. Chief Judge David Carruthers and Allen McRae, youth justice coordinator in Wellington, believe that the most serious cases are the best cases for restorative justice conferencing.⁵⁹ Research from North America and Britain also demonstrates that victim-offender mediation can be used successfully with very serious offenses.⁶⁰

“POINTS OF ENTRY” FOR RESTORATIVE JUSTICE INTERVENTIONS

The New Zealand experience supports a “multiple-entry-level” model in which restorative justice interventions might, in principle, be available at all stages of the process from arrest to postsentence. Of the offenses committed by young people in New Zealand, between 80 and 85 percent will be diverted by Police Youth Aid using a variety of techniques, ranging from simple warnings to formal cautions, from visits to parents to mini-conferences, to meetings with victims. Dr. Gabrielle Maxwell and Professor Allison Morris of Victoria University of Wellington, New Zealand, are currently researching police diversion to learn what works and what doesn't. Their research should provide us with useful information.

Of the remaining 15 to 20 percent of youth offenses, half will go to family group conferences by way of simple referral by police, rather than by court order. The cases are accepted by the conference coordinator and the conferences held and finalized without court involvement. This group often involves extremely serious offending—aggravated robbery, rape, sexual violence—but if there is complete agreement and a fully accepted plan that is monitored and completed, the court is not involved at all.

The last 7 to 10 percent go to youth court. These are usually the result of arrests or conferences not resulting in agreement. Even in these cases, the court must direct that a conference be held before it can exercise jurisdiction. Sometimes the court is required to make decisions about custody, bail terms, or other issues in the meantime.

Where the system works well, there is a high police diversion rate, a high occurrence of non-court family group conferences (because that shows the agencies trust one another to work together and ensure successful outcomes), and a low number of children coming to court. Before the legislation was introduced, approximately 12,000 young offenders were appearing in court each year. The number dropped to 2,500 in the year after the legislation was introduced.

THE EFFECTIVENESS OF RESTORATIVE JUSTICE

Research to date shows a high level of participation among victims and offenders and a consensus that they are being dealt with fairly. Evaluations of the main restorative justice approaches consistently report that a high proportion of cases result in an agreement being reached. As noted above, Judge Barry Stuart's experience in the Yukon shows agreement reached in 99 percent of cases. High levels of

compliance—ranging between 70 to 100 percent⁶¹—are reported for agreements that involve the payment of compensation or performance of other types of reparation. There is evidence⁶² that the compliance rate is higher for restitution obligations that are reached in the course of mediated agreements than for those imposed by the courts (81 percent and 58 percent, respectively).

Restorative justice evaluations also demonstrate that, for many victims, material reparation is less important than symbolic forms of reparation.⁶³ These include the tendering of an apology, a desire for information or the right to express feelings, and even an opportunity to display civic responsibility (including a desire to “help” the offender or reduce the likelihood that someone else will be victimized in the same way).⁶⁴ Initial findings from RISE⁶⁵ in Canberra show that victims whose cases were randomly assigned to police-led conferences were much more likely to receive an apology from their offenders than those whose cases were assigned to court.⁶⁶

IMPACT ON REOFFENDING

The research findings with regard to the impact of restorative justice on offending are inconclusive. But before we dismiss this approach as ineffective, it is important to remember that no matter which model is used, it will have relatively limited impact on reoffending when set against the kinds of factors that are known to be associated with offending behavior.⁶⁷ Consequently, provided the recidivism rate for offenders is no worse, the high levels of satisfaction recorded by victims and others provide ample justification for continuing to promote restorative justice approaches.

Some studies suggest cautious grounds for optimism that, under the right conditions, restorative justice approaches can have preventive effects. Young people who participate in a victim-offender reconciliation program are significantly less likely to reoffend than those assigned to the normal criminal justice process, and the reconvictions of those who do reoffend are less serious than the reconvictions of those assigned to the normal criminal justice process.⁶⁸ Family group conferences are more likely to be successful in reducing subsequent reoffending where they are memorable events, evoke remorse, and lead young people to attempt to make amends for what they have done.⁶⁹

Recent reports from New Zealand suggest that family group conferencing can be very effective in reducing offending behavior. Judge David Carruthers has reported⁷⁰ outstanding success using restorative justice practices in the Wellington, New Zealand, area. Youth offending has declined by about two-thirds over the last three years. One of the key factors in that decline has been the use of family

group conferences to identify patterns of offending and then to coordinate the community and government agencies to establish programs and projects aimed at prevention.

RESOURCES AND TRAINING

Restorative justice is resource-intensive and will not be successful unless sufficient resources for its implementation are made available. For this reason alone, investing scarce resources in dealing with minor offenses, which might be dealt with by way of police caution or the like, makes little sense. Family group conferencing should be reserved for more serious offenses, as is the case in New Zealand.

Danny Graham,⁷¹ an attorney with the Criminal Justice Section of the Canadian Bar Association, expresses concern that the capacity to implement restorative justice programs has often been absent in Canadian communities because programs have been underfunded and undersupported, particularly by governments. Many organizations in Canada have received funding to provide diversion programs or alternative measures that have restorative components but are not restorative justice in the full context of what is meant by the term.

In addition to resources, successful restorative justice programs require trained personnel to implement them. Some leading experts have expressed concern at the proliferation of programs and projects organized by people who have little understanding of the philosophy and concepts underpinning restorative justice. Judge David Caruthers notes that no one has ever identified and valued the skills required to run a family group conference properly. One crucial part of the process is dealing with people so that the meeting runs smoothly and productively and is respectful of everyone who participates. Equally important are the connections that the coordinator or facilitator makes with the community. Key people from the community must be invited and able to support the family decisions by action, resources, and intervention. Getting the right people to attend seems to be a crucial matter, and empowering the community to be involved in conferencing and to support family decision making also is important.

PROCEDURAL SAFEGUARDS FOR RESTORATIVE JUSTICE INTERVENTIONS

On the positive side, the models discussed above represent some of the most promising approaches for changing the nature of the sanctioning function in youth justice. On the negative side, the movement to devolve justice to the neighborhood level is fraught with dangers, ranging from

concerns about “net-widening” (broadening the reach of the system to take in more offenders) to power imbalances between young offenders and adults in conferencing settings, to insensitivity to victims, to the “tyranny of community” in cases where community dynamics have resulted in a variety of abuses.

Clearly there is a need for procedural safeguards to protect the legitimate interests of both victims and offenders and to secure the “balance” between their respective interests.

From the victim’s point of view, one of the paramount requirements is the avoidance of further harm in the course of dealing with the offense (often referred to as “secondary victimization”). Consequently, victims should be offered the chance to take part in whatever restorative justice processes might be made available, and they should be provided with sufficient unbiased information and guidance to enable them to reach an informed decision. However, they should on no account be coerced into taking part in the process.

The same principle applies with respect to the decision-making process itself, particularly in relation to the more serious cases. Victims are entitled to make their views known if they wish to. They should not be made responsible in any way for the decision that is reached. The responsibility for the final decision, at least in serious cases, must ultimately rest with criminal justice personnel, not with victims. Indeed, the retention of an effective mechanism for providing judicial oversight of the process in such cases offers a valuable safeguard for victims, offenders, and the wider community alike. It is unlikely that the cost of ensuring judicial oversight can be justified for less serious cases (those that are not initiated by the courts themselves). Here, other forms of safeguards (which apply equally to offenders) may be more appropriate. They include the promulgation of good practice standards, appropriate and accredited training procedures, and effective complaint procedures in case of grievances.

From the offender’s point of view, effective safeguards to guard against wrongful conviction and excessive punishment are needed. Consequently, offenders should always have recourse to a judicial hearing if they do not admit the charges brought against them. In principle, it is highly desirable that offenders’ participation in any restorative justice process should be based on *their* informed consent. However, it is also reasonable to expect them to accept responsibility for acts they admit to and for making reasonable amends to those who have been harmed by them. Ultimately, if they are unwilling to do this voluntarily, the victim’s right to justice demands that the normal judicial process will be initiated, and so, to

that extent, an offender's freedom of choice will inevitably be subject to constraint.

Because of the element of indirect coercion that may be involved, and also the risk that offenders may, under pressure, undertake obligations that are excessive in relation to the harm caused, other safeguards may also be advisable. One possibility is for legal advice to be made available to offenders before they agree to take part in a conference. Another possible safeguard is for a legal advisor to be on hand to offer counsel regarding the final outcome. However, there are genuine concerns over the part that lawyers might play if given unrestricted "rights of audience" within conferences, particularly if these were used to convert conferences into a more adversarial (and thus less appropriate) form of procedure.

The issue of standards and safeguards is important whatever mechanisms and procedures are adopted for the delivery of restorative justice interventions. It is particularly key where these interventions are intended to operate as alternatives to existing criminal justice procedures, which, whatever their other imperfections might be, normally incorporate judicial safeguards to protect individual rights. To ensure adequate protection for the legitimate interests of all the parties, therefore, and also to maintain public confidence in restorative justice programs, it is strongly advisable to devise, promote, and enforce a comprehensive set of practice standards that will seek to secure the integrity of all such programs.

DRAFT PRACTICE STANDARDS

Shortly after the Ninth United Nations Crime Congress in 1995,⁷² the NGO Alliance on Crime Prevention and Criminal Justice (New York) created the Working Party on Restorative Justice. The working party was made up of interested NGOs (nongovernmental organizations) in consultative status with the United Nations as well as other NGOs and individuals who had practical, research, or academic expertise in the subject. The working party prepared a draft document titled "Preliminary Draft Elements of a Declaration of Basic Principles" for consideration by the Tenth Crime Congress in April 2000.⁷³

"BASIC PRINCIPLES" INSTEAD OF "STANDARD MINIMUM RULES"

The UN has promulgated sets of norms related to many aspects of criminal justice. Sometimes these are in the form of basic principles, sometimes standards, and sometimes conventions or treaties. Principles give guidance to member nations, standards impose duties on nations, and treaties or conventions bind countries by agreement.

One of the UN's administrative and practical concerns when it adopts standards is that they often lead countries to request UN technical support to implement them. Such requests should not be unexpected; if the UN proposes standards it expects countries to follow without providing them (particularly developing countries) the resources to do so, it invites violations. The UN has limited funds, and if it is to establish standards and expect countries to meet those standards, it should have sufficient funds to help them do so. If it does not, it should not adopt the standards in the first place. To avoid this problem in the area of restorative justice, the UN has drafted basic principles instead of standards. They are designed to give guidance, not to impose duties on countries.

No country is required to use restorative justice programs. By contrast, every country has prisoners, victims, law enforcement officials, juveniles, courts, and so forth. The UN standards that have been adopted on those topics automatically apply to every country. But not every country will choose to use restorative processes, so the development of guidelines for those countries that do should not impose a burden on those who don't. The principles permit countries that are considering implementation of restorative justice to draw from the experience and wisdom of other countries, so that they can establish these programs in ways that are most likely to be effective. In other words, they provide guidance.

UN ACTION ADVANCING RESTORATIVE JUSTICE

Representatives from nearly 200 governments assembled in Vienna from April 10 to 17, 2000, for the Tenth Congress on the Prevention of Crime and the Treatment of Offenders. At the conclusion of the congress, the delegates approved a summary resolution known as the "Vienna Declaration." This resolution included recognition of the growth of restorative justice programs and called on governments to increase their use of restorative justice interventions.

The Canadian and Italian governments called on the UN to distribute the draft principles prepared by the Working Party on Restorative Justice and to solicit comments from governments and others. In addition, they asked the UN to convene a meeting of experts to review those comments and suggestions and to propose modifications or alternatives to the UN's Commission on Crime Prevention and Criminal Justice.

The commission met immediately after the Crime Congress, and on the first morning, 20 countries signed on as co-sponsors of the Canadian-Italian resolution. After lengthy discussion on the wording, the commission

adopted the resolution and provided that the secretary-general should report on progress at the 2002 commission meeting. It referred the resolution to the Economic and Social Council (ECOSOC), which adopted the resolution on July 27, 2000.

In September, the Centre for International Crime Prevention sent a letter to member states, intergovernmental organizations, NGOs in consultative status with the UN, and institutes of the UN. The letter asked for comments on the “desirability and means of establishing common principles on the use of restorative justice programs in criminal matters” and on the contents of the draft principles attached to the resolution. The deadline for replies was March 1, 2001.

It was agreed that if the Centre received replies from fewer than 30 nations, this would be taken as an indication of insufficient interest and no further action on the basic principles would take place. If the secretariat received 30 or more replies, it would convene a meeting of experts to review the comments received and examine proposals for further action, including development of basic principles on the use of restorative justice. The secretariat received a sufficient number of replies and the experts’ meeting was held in Ottawa, Canada, in October 2001.

OVERVIEW OF THE BASIC PRINCIPLES

The draft declaration consists of two parts: a preliminary resolution and an annex containing the basic principles themselves. The resolution refers to previous UN documents on the topic, showing that the annexed basic principles are consistent with a long progression of previous UN actions.

The first section of the annex provides definitions of several terms used in the basic principles: *restorative justice program*, *restorative process*, *restorative outcome*, *parties*, and *facilitator*. The second section covers the use of programs and provides that

- the programs should be generally available and voluntary;
- the programs should be used when facts are not contested;
- the fact of participation by the offender should not be used as evidence of guilt if the matter goes to trial;
- the process should be fair for both victims and offenders;
- all the parties should be protected against threats and intimidation; and, finally,
- when the restorative process cannot be used, the offender should still be encouraged to assume responsibility for reparations, and both victim and offender should be aided in their reintegration into the community.

Section three covers the operation of these programs, providing for

- the development of guidelines and standards;
- the protection of fundamental due process rights;
- the confidentiality of discussions in proceedings;
- the abandonment of prosecution when an agreement is reached;
- the return of the matter to the referring authority (police, prosecutor, or judge) for a decision about how to proceed when no agreement is reached; and
- the use of the same approach when an agreement is reached but not kept.

Section four deals with facilitators. They should be drawn from the community as a whole; familiar with local cultures and traditions; and impartial and fair in regard to the parties, affording them dignity and respect. The facilitator is responsible for creating an environment that is safe for each of the parties. The document notes that this is particularly important if any of the parties is particularly vulnerable. Therefore, facilitators should receive both initial and ongoing training.

The final section provides that regular consultation between those responsible for restorative programs and officials in the criminal justice system should occur; research into both the processes and the outcome of these programs should be carried out; and new programs should be continually developed.

RESTORATIVE JUSTICE HAS COME OF AGE

This article outlines the phenomenal growth of restorative justice and demonstrates the need to establish common principles for its use. The philosophy and practice of restorative justice are now being discussed at the highest levels and worldwide. The UN has established the year 2002 as a date for states to review their practices in support of crime victims, including “mechanisms for mediation and restorative justice.”⁷⁴ Clearly, restorative justice has moved from the periphery to center stage.

At the same time, it is clear that support for restorative justice in many countries’ justice communities is less than total. The reservation typically relates to whether the theory and principle can be anchored in consistently sound working practice. We can only hope that the drafting of basic principles by the UN will provide that anchor and bring about greater support for restorative justice within the justice community. If this occurs, the “quiet revolution” will indeed change the very nature and fabric of our work.

NOTES

1. Frederick W.M. McElrea, *Restorative Justice—The New Zealand Youth Court: A Model for Development in Other Courts?* 4 J. JUD. ADMIN. 34 (Aug. 1994).

2. James Dignan & Michael Cavadino, *Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice From a Victim's Perspective*, 4 INT'L REV. VICTIMOLOGY 153 (1996); Joanna Shapland, *Reparative Justice: Complexity and Apple Pie 2* (1992) (unpublished paper presented at the Third European Colloquium on Crime and Public Policy).

3. Eduardo Barajas, Jr., *Moving Toward Community Justice*, in COMMUNITY JUSTICE: STRIVING FOR SAFE, SECURE, AND JUST COMMUNITIES 1 (Nat'l Inst. of Corr., U.S. Dep't of Justice 1996), at www.nicic.org/pubs/1996/013227.pdf.

4. Ted Wachtel, *Restorative Justice in Everyday Life: Beyond the Formal Ritual*, at www.restorativepractices.org/Pages/anu.html.

5. *Id.*

6. *Id.*

7. For example, if two thieves snatch purses containing goods of identical monetary value, they will receive the same sentence. However, the crime may have a different impact on each victim. If one victim were carrying two hundred dollars and a lipstick, while the other carried a \$200 pocket watch that had belonged to her dead husband, the loss to the second victim would be much greater. Equal sentences would not do justice to these very different losses.

8. Many other contemporary approaches to justice policy incorporate elements of restorative justice without completely adopting it. Therefore, this article will not consider victim support services, victim impact statements, or victim allocation rights because they focus only on the victim.

Other programs have developed in parallel with restorative justice and help to meet its goals. Conflict resolution, based on a process of mediation, is an important development. One conflict resolution technique, alternative dispute resolution (ADR), is widely used in a variety of sectors, including disputes within families and schools, commercial disputes, and those involving environmental conflicts or complaints relating to health-care and medical matters. Clearly the ADR process is relevant because civil disputes could escalate to the criminal level if not resolved. However, because of pressures on time and space, we will not deal with it here.

In another parallel development, schools in Northern Ireland, England, New Zealand, and Australia (and, I am sure, in many other countries) are increasingly using restorative justice approaches to problems of discipline

with a view to preventing suspensions, expulsions, and exclusions—a development reflecting the recognition that when the school community has been affected by “crime,” the community needs to be fully involved in restoring its balance. Margaret Thorsbon’s research in Australia, which focused on 73 schools in Queensland, showed markedly improved outcomes for all parties from a restorative justice approach to disciplinary problems. In a similar vein, restorative justice approaches are now being used widely in prisons for the same reasons—to substitute a communitarian response for an offender-based one to breaches of the community’s rules.

9. James Dignan, *The Crime and Disorder Act and the Prospects for Restorative Justice*, 46 CRIM. L. REV. 48 (Jan. 1999).

10. ERIK LUNA, REASON AND EMOTION IN RESTORATIVE JUSTICE 3 (N.Z. Ctr. for Conflict Resolution 2000).

11. Letter from David Carruthers, Chief District Court Judge, New Zealand, to Willie McCarney (on file with author).

12. Warren Young & Allison Morris, *Reforming Criminal Justice: Reflecting on the Present and Imagining the Future* 10 (Oct. 1998) (unpublished paper presented at the International Youth Conference).

13. *Id.*

14. Dignan & Cavadino, *supra* note 2, at 169.

15. Frederick W.M. McElrea, *The New Zealand Youth Court: A Model for Use With Adults? in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 69 (Burt Galaway & Joe Hudson eds., Criminal Justice Press 1996).

16. JOY WUNDERSITZ, THE SOUTH AUSTRALIAN JUVENILE JUSTICE SYSTEM: A REVIEW OF ITS OPERATION (S. Austl. Attorney General’s Dep’t 1996).

17. ANN MARKIEWICZ, JUVENILE JUSTICE GROUP CONFERENCING IN VICTORIA: AN EVALUATION OF A PILOT PROGRAMME (Univ. of Melbourne 1997).

18. HENNESSEY HAYES & TIM PRENZLER, MAKING AMENDS: FINAL EVALUATION OF THE QUEENSLAND COMMUNITY CONFERENCING PILOT (Griffith Univ. 1998).

19. JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION (Cambridge Univ. Press 1989). Braithwaite defines two distinct types of shaming: stigmatic and reintegrative. Stigmatic shaming, designed to mark the offender as an outcast, disintegrates the bonds between the offender and the community. Reintegrative shaming, which condemns the crime rather than the criminal, re-forms the bond by requiring the offender to express remorse, apologize to the victim, and repair the harm caused by the crime.

20. JOHN McDONALD ET AL., REAL JUSTICE TRAINING MANUAL: CO-ORDINATING FAMILY GROUP CONFERENCES (Piper's Press 1995); Paul McCold, Police-Facilitated Restorative Conferencing: What the Data Show 2 (Nov. 1998) (unpublished paper presented to the Second Annual Conference on Restorative Justice for Juveniles).
21. McCold, *supra* note 20, at 2.
22. LAWRENCE W. SHERMAN ET AL., EXPERIMENTS IN RESTORATIVE POLICING: A PROGRESS REPORT TO THE NATIONAL POLICY RESEARCH UNIT ON THE CANBERRA REINTEGRATIVE SHAMING EXPERIMENTS (RISE) (Austl. Nat'l Univ. Press 1998).
23. Five separate police departments, the best known of which is Bethlehem, Pennsylvania, use restorative conferencing techniques. PAUL MCCOLD & BENJAMIN WACHTEL, RESTORATIVE POLICING EXPERIMENT: THE BETHLEHEM, PENNSYLVANIA, POLICE FAMILY GROUP CONFERENCING PROJECT (Cmty. Serv. Found. 1998); McCold, *supra* note 20, at 2.
24. The Royal Canadian Mounted Police, based in Regina, Saskatchewan, use conferencing.
25. At least three police forces, including Thames Valley, Humberside, and North Nottinghamshire, use the model.
26. When a juvenile has been arrested for an offense and admits guilt, he or she may be asked to come to the local police station, accompanied by one or both parents. There a senior uniformed police officer (rank of inspector or above) meets with the family and informs the offender that the police will not press charges on this occasion. The officer formally warns the offender that, if he or she breaks the law again, the police will take the case to court. A record is kept of this official caution. In the event of future court appearances, the police will present the record to the bench, after a finding of guilt, as evidence of a "previous offense." An official police caution is normally only given in the case of first or minor offenses.
27. Bria Huculak, Presentation to the International Conference on Restorative and Community Justice: Inspiring the Future (Mar. 2001).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 15 (Her Majesty's Stationery Office 1999).
34. See *infra* notes 45 and 46 and accompanying text.
35. MICHAEL J. DOOLEY, REPARATIVE PROBATION PROGRAM (Vt. Dep't of Corr. 1995); MICHAEL J. DOOLEY, RESTORING HOPE THROUGH COMMUNITY PARTNERSHIPS: THE REAL DEAL IN CRIME CONTROL (Am. Prob. & Parole Ass'n 1996); GORDON BAZEMORE & MARK UMBREIT, CONFERENCES, CIRCLES, BOARDS, AND MEDIATIONS: RESTORATIVE JUSTICE AND CITIZEN INVOLVEMENT IN THE RESPONSE TO YOUTH CRIME 3 (Univ. of Minn. & Fla. Atlantic Univ. 1998).
36. HOME OFFICE, NO MORE EXCUSES—A NEW APPROACH TO TACKLING YOUTH CRIME IN ENGLAND AND WALES ¶ 9.21 (Home Office 1997), available at www.homeoffice.gov.uk/cpd/jou/nme.htm#CHAP9.
37. *Id.* ¶ 9.30; see Youth Crime & Criminal Evidence Act, 1999, ch. 23, § 3(1)(c) (Eng.). All acts of Parliament are available at www.hmso.gov.uk.
38. HOME OFFICE, *supra* note 36, ¶ 9.33.
39. Youth Crime & Criminal Evidence Act, 1999, ch. 23.
40. *Id.* §§ 6, 14. See also Crime & Disorder Act, 1998, ch. 37, § 39 (Eng.).
41. Youth Crime & Criminal Evidence Act § 8(1).
42. *Id.* § 8(2).
43. *Id.* § 8(3). A home curfew, however, may be imposed. *Id.* § 8(2).
44. *Id.* § 4.
45. HOWARD ZEHR, RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE (Mennonite Cent. Comm. 1985); HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIMINAL JUSTICE (Herald Press 1990).
46. Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1 W. CRIMINOLOGY REV. 9 (1998), at wcr.sonoma.edu/v1n1/umbreit.html.
47. PETER YOUNG, CRIME AND CRIMINAL JUSTICE IN SCOTLAND 66 (Her Majesty's Stationery Office 1997).
48. *Het ALTERNatief*, Dutch for "the alternative."
49. AUDIT COMM'N, MISSPENT YOUTH: YOUNG PEOPLE AND CRIME 47 (Audit Comm'n 1996).
50. *Id.*
51. See LA MÉDIATION PÉNALE: ENTRE RÉPRESSION ET RÉPARATION (Robert Cario ed., l'Harmattan 1997).
52. See *id.*
53. Bernard Jervis, *Developing Reparation Plans Through Victim-Offender Mediation by New Zealand Probation Officers*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 15, at 417.

- NOTES
54. Crime & Disorder Act, 1998, ch. 37 (Eng.).
 55. Dignan, *supra* note 9, at 53.
 56. Carruthers, *supra* note 11.
 57. Because conferencing is both time- and resource-intensive, less-serious offenses are dealt with by the police through cautions or other diversionary practices without referral to courts or conferences.
 58. Gabrielle Maxwell, Crossing Cultural Boundaries: The Experience of Family Group Conferences 2 (Nov. 1998) (unpublished paper presented at the Conference on Implementing Restorative Justice in the International Context).
 59. Carruthers, *supra* note 11.
 60. See, e.g., Mark S. Umbreit, *Victim-Offender Mediation With Violent Offenders*, in THE VICTIMOLOGY HANDBOOK (Emilio Viano ed., Garland 1990).
 61. MARSHALL, *supra* note 33, at 18.
 62. Mark S. Umbreit & Robert B. Coates, *Cross-Site Analysis of Victim Offender Mediation in Four States*, 39 CRIME & DELINQ. 565 (1993).
 63. TONY F. MARSHALL & SUSAN MERRY, CRIME AND ACCOUNTABILITY: VICTIM/OFFENDER MEDIATION IN PRACTICE (Her Majesty's Stationery Office 1990); see LA MÉDIATION PÉNALE, *supra* note 51.
 64. TIM GOODES, VICTIMS AND FAMILY CONFERENCES: JUVENILE JUSTICE IN SOUTH AUSTRALIA (Family Conferencing Team 1995).
 65. Reintegrative Shaming Experiments (RISE) are described as the largest criminological experiment ever conducted in Australia and one of the largest in the world. For further information on RISE, see www.aic.gov.au/rjustice/rise/.
 66. LAWRENCE W. SHERMAN & HEATHER STRANG, THE RIGHT KIND OF SHAME FOR CRIME PREVENTION (Austl. Nat'l Univ. Press 1997), www.aic.gov.au/rjustice/rise/working/risepap1.html.
 67. Factors that contribute to offending behavior include poverty, unemployment, overcrowded living conditions, inner-city slum areas, siblings involved in crime, parents involved in crime, and peers involved in crime. WUNDER-SITZ, *supra* note 16, at 198. See also HAYES & PRENZLER, *supra* note 18, at 10.
 68. HAYES & PRENZLER, *supra* note 18, at 10; William R. Nugent & Jeff Paddock, *The Effect of Victim-Offender Mediation on Severity of Reoffense*, 12 MEDIATION Q. 353 (1995).
 69. Gabrielle Maxwell, Researching Offending 7 (Oct. 1998) (unpublished paper presented at the International Youth Justice Conference on Youth Justice in Focus).
 70. David Carruthers, Contribution to e-mail discussion on restorative justice (Nov. 27, 2000) (on file with author).
 71. Danny Graham, Contribution to e-mail discussion on restorative justice (Nov. 27, 2000) (on file with author).
 72. Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt (May 1–10, 1995).
 73. Crime Congresses are held once every five years.
 74. VIENNA DECLARATION ON CRIME AND JUSTICE: MEETING THE CHALLENGES OF THE TWENTY-FIRST CENTURY ¶ 27 (Apr. 15, 2000), www.uncjin.org/Documents/congr10/4r3e.pdf.